

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 327X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT, DISCONTINUANCE  
OF TRACKAGE RIGHTS AND DISCONTINUANCE OF SERVICE—IN CLEVELAND AND  
RUTHERFORD COUNTIES, N.C., AND CHEROKEE COUNTY, S.C.

Decided: August 4, 2015

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuance of Service to abandon and discontinue trackage rights and service as follows: (1) NSR will abandon approximately 11.85 miles of rail line in Cleveland County, N.C., consisting of two line segments, one of which is located between milepost SB 144.55 and milepost SB 154.50 and the other between milepost SB 158.10 and milepost SB 160.00 (collectively, the Line); (2) NSR will discontinue trackage rights granted to it by CSX Transportation, Inc. (CSXT) over approximately 22.8 miles of CSXT track, located in Cleveland and Rutherford Counties, N.C., between milepost SF 384.6 and milepost SF 407.4;<sup>1</sup> and (3) NSR will discontinue service over approximately 3.20 miles of rail line in Cherokee County, S.C., extending between milepost SB 144.55 and milepost SB 141.35.<sup>2</sup> Notice of the exemption was served and published in the Federal Register on July 6, 2015 (80 Fed. Reg. 38,511). The exemption is scheduled to become effective on August 5, 2015.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on July 10, 2015, recommending that three conditions be imposed on any decision granting abandonment authority.<sup>3</sup> In the EA, OEA stated that the National Geodetic Survey (NGS) submitted comments indicating that three geodetic station markers may be located near the Line. OEA accordingly recommended that a condition be imposed requiring NSR to notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers, in order to plan for the possible relocation of the geodetic station markers by NGS.

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<sup>1</sup> The CSXT track over which NSR has trackage rights connects the two line segments that NSR seeks to abandon.

<sup>2</sup> NSR states that, although there are different line segments involved, it operates them as if they were a single line.

<sup>3</sup> OEA considered only the potential environmental impacts related to the diversion of traffic from, and the salvage of, the lines that NSR proposed to abandon. OEA did not consider any impacts related to the lines proposed for discontinuance.

OEA also stated that NSR requested comments from the North Carolina Department of Environment and Natural Resources (NCDENR) regarding the need for a National Pollution Discharge Elimination System (NPDES) permit under Section 402 of the Clean Water Act (33 U.S.C. § 1251). Although NCDENR did not provide comments, based on the information available to it OEA concurred with NSR that a NPDES permit would not be required for the proposed abandonment. However, because the Line crosses several streams and because salvage activities would include the removal of two bridges over streams, OEA recommended that a condition be imposed requiring NSR to consult with NCDENR, prior to the commencement of any salvage activities, regarding the potential for impacts of salvage activities on water quality and to comply with that agency's reasonable permitting requirements. OEA further recommended that NSR be required to report back the results of any consultations with NCDENR prior to beginning salvage activities.

In addition, OEA stated that NSR requested comments from the Wilmington District of the U.S. Army Corps of Engineers (the Corps) regarding the need for a permit under Section 404 of the Clean Water Act (33 U.S.C. § 1344). According to OEA, the Corps commented that salvage activities would be unlikely to impact streams and wetlands within the rail right-of-way, but that the discharge of excavated or fill material into waterways or wetlands under the Corps' jurisdiction would require a Corps permit pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344). Because the Corps requested additional information regarding the extent of the proposed abandonment and the location of stream and wetlands in the project area, OEA recommended imposing a condition requiring NSR to consult with the Corps, prior to the commencement of any salvage activities, regarding the potential for impacts of salvage activities on wetlands and waterways and to comply with the Corps' reasonable permitting requirements. OEA also recommended requiring NSR to report back the results of any consultations with the Corps prior to beginning salvage activities.

OEA issued its final EA on July 30, 2015, noting that no comments to the EA were received by the July 27, 2015 due date and recommending that the three previously recommended environmental conditions be imposed. Accordingly, the three conditions recommended by OEA in the EA will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On June 18, 2015, the City of Shelby (the City) filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with NSR for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, the City also has submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on June 22, 2015, NSR indicated its willingness to negotiate with the City for interim trail use and its support for the City's request.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, NSR may fully abandon the Line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The City also has requested the imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. The City's justification for this request is that these structures have considerable value for recreational trail purposes and that the 180-day period is needed to commence negotiations with NSR.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from August 5, 2015, the effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on February 1, 2016, while the trail use negotiation period will run 180 days from the service date of this decision and notice, until January 31, 2016. If a trail use agreement is reached for a portion of the right-of-way prior to January 31, 2016, NSR must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any

one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on July 6, 2015, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with NSR for trail use for the rail line, for a period of 180 days from the service date of this decision and notice, until January 31, 2016, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until February 1, 2016. The abandonment also is subject to the conditions that: (1) NSR shall notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS; (2) prior to the commencement of any salvage activities, NSR shall consult with NCDENR regarding the potential for impacts of salvage activities on water quality and shall comply with that agency's reasonable permitting requirements. NSR shall report back the results of any consultations with NCDENR prior to beginning salvage activities; and (3) prior to the commencement of any salvage activities, NSR shall consult with the Corps regarding the potential for impacts of salvage activities on wetlands and waterways and shall comply with the Corps' reasonable permitting requirements. NSR shall report back the results of any consultations with the Corps prior to beginning salvage activities.
3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall otherwise keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until February 1, 2016, to enable any state or local government agency, or other interested person to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.
4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the

sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in the paragraph above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by January 31, 2016, for the right-of-way, interim trail use may be implemented. If no agreement is reached, NSR may fully abandon the Line.

9. This decision and notice is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.